No. 92-1690

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH P. BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a pattern or practice of racial discrimination at petitioner's apartment building: Black persons were shown fewer apartments than white applicants, and they were quoted higher rents and later dates of availability for the apartments they were shown. The questions presented are:

1. Whether the discriminatory conduct violated the Fair Housing Act even though the applicants were "testers" who had no intention of actually renting apartments.

2. Whether the black testers may recover compensatory damages for the emotional distress caused by having been discriminated against on the basis of race.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 981 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. A petition for rehearing was denied on January 20, 1993. Pet. App. 58a-59a. The petition for a writ of certiorari was filed on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns the Shorecrest Apartments in Milwaukee, Wisconsin, where Angelina Hurdelbrink was the rental agent. During April and May of 1989, the Metropolitan Milwaukee Fair Housing Council (Council) sent five sets of volunteer "testers" to the Shorecrest Apartments. A tester is a person who, without intending to rent an apartment, poses as a prospective renter in order to determine whether a property owner is complying with the requirements of fair housing laws. Pet. App. 1a-2a.

In each test, one white tester and one black tester visited the property within a short time of each other. The testers, who would indicate similar family and financial circumstances, inquired about the availability of apartments. Pet. App. 2a. Each time, the black tester was treated less favorably than the white tester in one or more ways: by being shown fewer apartments, quoted higher rents, or quoted later dates of availability. Pet. App. 2a-5a, 12a. When they discovered that they had been discriminated against, the black testers became angry and upset. See Pet. App. 15a-16a. In addition to the treatment of the testers, and at about the same time, Hurdelbrink made special efforts to rent an apartment to Maureen Wahl, who is white, to avoid renting it to Marva Pattillo, a black person who was interested in the same apartment. Pet. App. 6a-7a, 12a.

2. Congress has authorized the Attorney General to bring a civil action to enforce the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, whenever she has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights

granted by [the Act]." 42 U.S.C. 3614(a). The United States sued petitioner and Hurdelbrink, alleging a pattern or practice of discriminatory rental practices in violation of Section 804 of the Act, 42 U.S.C. 3604.[1] Following a trial, the jury found that petitioner and Hurdelbrink had violated the Fair Housing Act by intentionally engaging in a pattern or practice of discrimination against black persons, and awarded each black tester $2,000 in compensatory damages for the emotional distress caused by the discrimination. See Pet. App. 7a.

3. The court of appeals affirmed. As to liability, the court stated:

> [T]he evidence showed that (at least in [the five test cases and the Pattillo-Wahl case]) Hurdelbrink consistently treated the black apartment seekers somewhat less favorably than the white apartment seekers. Based on this evidence, the jury could conclude Hurdelbrink's treatment of the black testers violated the Fair Housing Act's prohibitions against racial discrimination in the

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[1] That statute, in relevant part, makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race * * *.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling * * * because of race * * *.
>
> * * * * *
>
> (d) To represent to any person because of race * * * that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. 3604.

> terms or conditions for housing rental and against racially-motivated misrepresentations about housing availability.

Pet. App. 12a. The court further held that the government had proven a pattern or practice of discrimination, because "over a relatively brief period (a little more than a month) five black testers and Marva Pattillo visited the Shorecrest. In *each* case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms and, except in one instance, being shown fewer apartments." Pet. App. 13a. Finally, the court held that "the jury could reasonably conclude from [petitioner's] presence at and control of the Shorecrest, and his extensive contacts with employees, that he knew about, and approved, Hurdelbrink's actions," Pet. App. 14a, and that, in any event, petitioner was liable for Hurdelbrink's conduct on an agency theory, Pet. App. 14a-15a.

As to the damages issue, the court recognized that a person who suffers discrimination he himself invites may be less likely than a bona fide home seeker to feel humiliated by that discrimination. Pet. App. 19a. Nevertheless, the court noted that "[t]he jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury." *Ibid.* The court accordingly held that, "[g]iven that deference to the jury, * * * the testimony was sufficient in this case to support the jury's modest awards for emotional distress." *Ibid.*[2]

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[2] The court of appeals also affirmed the jury's award of compensatory damages to the Council, Pet. App. 20a-21a, affirmed the district court's injunction against further viola-

ARGUMENT

1. Petitioner renews his contention (Pet. 12-24) that there were no Fair Housing Act violations in this case because none of the testers was actually seeking an apartment. That contention is meritless.

a. This Court has held that Section 804(d) of the Fair Housing Act, 42 U.S.C. 3604(d), "establishes an enforceable right to truthful information concerning the availability of housing." *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982). Falsely informing testers that apartments are not available violates that right. *Id.* at 373-374.[3] In this case, four out of five black testers were shown fewer apartments than were shown to white testers who visited the Shorecrest Apartments at about the same time. As to those apartments shown to white testers only, Hurdelbrink effectively represented to the black testers that the apartments were unavailable. That misrepresentation violated Section 804(d), which makes it illegal to misinform "any person" about the availability of housing. See, *e.g.*, *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

In addition, at least two black testers were told that apartments would be available later than white testers were told the same apartments would be available. To tell a black tester in mid-May that an apartment would not be available until July, while

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tions of the Fair Housing Act, Pet. App. 21a-22a, and remanded for consideration of several damages issues, Pet. App. 22a-27a. Petitioner does not contest those determinations in this Court.

[3] This Court's explicit recognition of testers' rights in *Havens Realty* forecloses petitioner's argument (see Pet. 16-19) that a housing applicant must be both interested and qualified to complain of being discriminated against.

informing a white tester that the same apartment would be available at the beginning of June, see Pet. App. 4a, is literally "[t]o represent * * * that [a] dwelling is not available for * * * rental when such dwelling is in fact so available." 42 U.S.C. 3604(d). Because testers are protected by Section 804(d), see *Havens Realty*, 455 U.S. at 373-374, petitioner's argument that no Fair Housing Act violations were proven in this case is without merit.

b. Petitioner concedes that "black testers [were] provided in some cases with higher rental quotes or differing availability dates than their white counterparts." Pet. 19-20. In fact, the court of appeals found that "[i]n *each* case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms." Pet. App. 13a. That is a violation of Section 804(b), which makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling * * * because of race." 42 U.S.C. 3604(b).

Petitioner argues (Pet. 15) that "a tester, who has no genuine interest in becoming a resident in a given building or neighborhood[,] can have no personal stake in the specific terms of such residency." This Court rejected just such an argument in *Havens Realty*, explaining that a tester had been discriminated against when, because of his race, he was falsely told that an apartment was unavailable: "That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)." 455 U.S. at 374. Similarly, when a housing agent offers (as Hurdelbrink did) to rent an apartment on less favorable terms to a black person

than to a white person, and that differential offer is made because of race, the black person has been discriminated against. That the black person may not actually avail himself of the housing opportunity does not change that fact, and so does not negate the violation of Section 804(b).

Petitioner's argument (Pet. 15-16) that Section 804(b) applies only to bona fide applicants is spurious. This Court recognized in *Havens Realty* that "[w]hereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act, 42 U.S.C. § 3604(a), required that there be a 'bona fide offer' to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d)." 455 U.S. at 374 (footnote omitted). Congress likewise did not limit the applicability of Section 804(b) to bona fide applicants, but made it unlawful to discriminate against "any person" in the terms and conditions of rental.[4] Quoting higher prices and later dates of availability to black people discriminates on the basis of race in the terms and conditions of rental and, as in *Havens Realty*, the fact

[4] Petitioner contends that "the [court of appeals] ignored that this Court declined in *Havens* to conclude that a tester could assert a claim under § 3604(a) (refusing to deal or negotiate), although § 3604(a) contained the identical prohibition of actions against 'any person.'" Pet. 22. Petitioner misreads both the statute and this Court's opinion. While Section 804(a) does prohibit discrimination against "any person," its protections apply only "*after* the making of a bona fide offer." 42 U.S.C. 3604(a) (emphasis added). This Court stressed in *Havens Realty* that Congress specifically included that requirement only in Section 804(a). 455 U.S. at 374.

that the victims of that discrimination were testers is irrelevant. See Pet. App. 11a-12a.[5]

2. Petitioner suggests (Pet. 25-30) that testers should not be able to recover emotional distress damages. Petitioner cites no case, however, and we have found none, in which a victim of discrimination was barred from recovering compensatory damages simply because he may have been aware of the possibility of discrimination. Indeed, this Court recognized in *Havens Realty* that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against," 455 U.S. at 373; it would be incongruous not to allow the tester to recover any actual damages suffered as a result of that statutory injury. Cf. *Carey* v. *Piphus*, 435 U.S. 247, 263-264 (1978) ("Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.").

Thus, the only question is whether the evidence supports the award of compensatory damages in this case. Each of the black testers was angry about

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[5] Petitioner complains (Pet. 24) that the court of appeals' decision will "tie the hands of any property owner in terms of his ability to set prices, negotiate, or do anything other than give verbatim information and lockstep tours of his property to any potential tenant or purchaser." As this Court recognized in *Havens Realty*, however, "Congress has * * * conferred on *all* 'persons' a legal right to truthful information about available housing." 455 U.S. at 373 (emphasis added). That right imposes a concomitant obligation on property owners to provide that truthful information. Thus, to the extent petitioner seeks to discriminate against potential tenants on the basis of race, it is the Fair Housing Act, not the decision below, that "tie[s] [his] hands."

having been discriminated against. They expressed their feelings in terms of being upset, hurt, humiliated, embarrassed, and shamed. Some reported that the experience made them feel helpless, afraid, suspicious, and wary. Pet. App. 15a-16a. Four of the five testers stated that this was the first time they had ever been victimized by discrimination in a test. The jury, after hearing their testimony, determined that the testers had suffered emotional distress. The court of appeals correctly found that factual determination to be supported by the evidence, and upheld the jury's "modest" (Pet. App. 19a) award of $2,000 in compensatory damages to each tester. Further review of that determination is not warranted. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (relying on "settled practice" of not reviewing factual findings upheld by the court of appeals absent "exceptional circumstances").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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